DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
ROBERT E. HARRIS
FROM AN
OBJECTION BY THE NEW YORK STATE
DEPARTMENT OF STATE

December 02, 1992

SYNOPSIS OF DECISION

Robert E. Harris (Appellant) owns three parcels of land on the shore of the Hudson River in Rensselaer, New York. On January 30, 1990, the Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit to construct a dock behind his property. The dock would consist of a 75 foot fixed walking pier extending from the shore to an existing bulkhead and a floating pier with 18 slips extending an additional 140 feet into the Hudson River. The Appellant indicated that a rental fee would be charged for several of the berthing places.

The Appellant certified in his application to the Corps that his project complied with and would be conducted in a manner consistent with the federally approved New York Coastal Management Program (NYCMP). Pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (Act), 16 U.S.C. § 1456(c)(3)(A), the State of New York (State) reviewed the Appellant's consistency certification. On September 28, 1990, the State objected to the certification on the grounds that the project was inconsistent with the following policies:

> State Policy #23 and City of Rensselaer Policy #23: Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology, or culture of the state, its communities, or the Nation.
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> State Policy #1 and City of Rensselaer Policy #1: Restore, revitalize, and redevelop deteriorated and under utilized waterfront areas for commercial and industrial, cultural, recreational, and other compatible uses.
>
> City of Rensselaer Policy #1D: Stabilize and revitalize the historic Fort Crailo and Bath neighborhoods for residential and compatible limited commercial uses.
>
> State Policy #2 and City of Rensselaer Policy #2: Facilitate the siting of water-dependent uses and facilities on or adjacent to coastal waters.

The State is required pursuant to 15 C.F.R. § 930.64(b)(2) to describe "alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program." As an alternative that would be consistent with the NYCMP, the State recommended the construction of a small dock with eight slips which would provide for the recreational use of the upland property owner or renter(s).

Pursuant to section 307(c)(3)(A) of the Act and 15 C.F.R. § 930.131, the State's objection precludes the Corps from issuing any permit required for the Appellant's project to proceed unless the Secretary of Commerce (Secretary) finds that the activity objected to may be federally approved because it is consistent with the objectives of the Act (Ground I) or necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must override the State's objection.

On October 26, 1990, the Appellant sent a letter to the Secretary appealing the objection to the consistency certification by the State. The Appellant perfected his appeal by submitting data and information in support of his appeal by letter dated November 19, 1990. The Appellant failed to submit his brief on time so the State filed a motion to dismiss. The Appellant submitted his brief on March 8, 1991. The State renewed its motion to dismiss on March 19, 1991, and added that "the Appellant is basing his appeal on an 'amended project' that has never been the subject of a [Corps] permit application" and therefore it was not reviewed by the State. The Department denied the State's motion to dismiss. The Appellant pleads Ground I.

The Secretary, upon consideration of the information submitted by the parties and interested Federal agencies, as well as other information in the administrative record of the appeal, made the following findings pursuant to 15 C.F.R. § 930.121:

Ground I

In order to find the fourth element of Ground I satisfied, the Secretary must find that there is no reasonable alternative to the Appellant's project available that would permit the activity to be conducted in a manner consistent with the NYCMP. In its letter of objection, the State identified an alternative to the project that would be consistent with the NYCMP. The Secretary found that alternative to be reasonable and available. Because the fourth element of Ground I was therefore not met, it was unnecessary to examine the other three elements (pp. 5-10).

Conclusion

Because the Appellant's proposed project failed to satisfy the requirements of Ground I, and the Appellant did not plead Ground II, the Secretary did not override the State's objection to the Appellant's consistency certification, and consequently, the proposed project may not be permitted by Federal agencies.

DECISION

Factual Background

On January 30, 1990, Robert E. Harris (Appellant) applied to the New York District Office of the U.S. Army Corps of Engineers (Corps) for a permit under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, to construct a dock on the Hudson River behind his property in Rensselaer, New York. Application for the Department of the Army Permit, reproduced in the Appellant's submission in support of the Notice of Appeal by letter dated November 19, 1990, submitted with a cover letter to the Corps dated February 6, 1990. The narrative description he submitted described a 75 foot fixed walking pier extending from the shore to an existing bulkhead and a floating pier with 18 slips extending an additional 140 feet into the Hudson River. Id. The proposed facility would serve the Appellant, the tenants of the upland property, and a few neighbors and friends. Id. The Appellant indicated that a seasonal rental fee would be charged for several of the berthing places. Id. The Appellant certified in his Federal Consistency Assessment Form, submitted with his Corps permit application, that the proposed activity complied with and would be conducted in a manner consistent with the federally approved New York Coastal Management Program (NYCMP). Id.

On September 28, 1990, the State wrote to the Appellant that it found the project to be inconsistent with the following policies:

> State Policy #23 and City of Rensselaer Policy #23: Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology, or culture of the state, its communities, or the Nation.[1]
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> State Policy #1 and City of Rensselaer Policy #1: Restore, revitalize, and redevelop deteriorated and under utilized waterfront areas for commercial and industrial, cultural, recreational, and other compatible uses.
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> City of Rensselaer Policy #1D: Stabilize and revitalize the historic Fort Crailo and Bath

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[1] The State noted that the Appellant's proposed project would be located in the Fort Crailo neighborhood which is listed in the National Register of Historic Places. The State mentioned that the Appellant indicated that the mooring space would be available to people not residing on the adjacent upland property and that a fee was to be charged for its use. The State determined that this suggested a commercial marina which is not permitted in a Historic Residential (HR) district.

neighborhoods for residential and compatible limited commercial uses.[2]

State Policy #2 and City of Rensselaer Policy #2: Facilitate the siting of water-dependent uses and facilities on or adjacent to coastal waters. [3]

State's Consistency Objection Letter, dated September 28, 1990.

As an alternative measure which would be consistent with the NYCMP, the State proposed the construction of a small dock, incorporating no more than eight slips, which would provide for the personal recreational use of the upland property owner or renter(s). In addition to explaining the basis of its objection, the State notified the Appellant of his right to appeal the State's decision to the Department of Commerce (Department) as provided under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (Act), 16 U.S.C. § 1456(c)(3)(A) and 15 C.F.R. Part 930, Subpart H of the Department's implementing regulations. Id.

Under section 307(c)(3)(A) of the Act, and 15 C.F.R. § 930.131, the State's objection to the Appellant's project on the ground that it is inconsistent with the NYCMP precludes the Corps from issuing any permit required for the project to proceed unless the Secretary of Commerce (Secretary) determines that the project is "consistent with the objectives of [the Act] or is otherwise necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A).

Appeal to the Secretary of Commerce

On October 26, 1990, in accordance with section 307(c)(3)(A) of the Act and 15 C.F.R. Part 930, Subpart H, the Appellant submitted a letter to the Secretary of Commerce, appealing the State's objection to the Appellant's consistency certification for the proposed project. Letter from the Appellant to the Secretary dated October 26, 1990. The Appellant's notice of appeal requested an extension until November 15, 1990 to file a statement and supporting documents for the appeal. The State agreed orally to that extension and, by letter dated

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[2] The State found that the Local Waterfront Revitalization Program (LWRP) identified the Bath neighborhood as one in which marine commercial use is recommended. The LWRP did not identify the Fort Crailo neighborhood as one where marine commercial is a recommended use.

[3] The State noted that Guideline #4 under State Policy #2 states that "... water dependent uses should be located so that they enhance, or at least do not detract from, the surrounding community. Consideration should also be given to such factors as the protection of nearby residential areas from odors, noise and traffic..." The State found that there would be a negative impact on the adjacent residential community from the traffic generated by the marina.

November 19, 1990, the Appellant submitted his data and information in support of the appeal.

On December 19, 1990, a briefing schedule was established by a letter from then-Deputy Under Secretary Castle (Briefing Letter) giving the Appellant 35 days from receipt of that letter to file his brief. The State requested dismissal of the appeal on February 11, 1991, on the grounds that the Appellant had failed to submit documents that addressed the points specified in the Briefing Letter. On February 20, 1991, the Appellant verbally requested an extension to submit his brief. The Department recommended that the Appellant and the State determine a mutually agreeable extension. By letter dated February 20, 1991, the State committed to writing its agreement with the Appellant that he would serve his brief on the State and the Department on or before March 4, 1991. On March 5, 1991, the State renewed its dismissal motion. The Appellant's brief was received by the Department on March 11, 1991.

On March 19, 1991, the State again renewed its motion to dismiss and added an additional ground that "the Appellant is basing his appeal on an 'amended project' that has never been the subject of a [Corps] permit application" and therefore it was not reviewed by the State.[4] By letter dated May 16, 1991, from John A. Knauss, Administrator, National Oceanic and Atmospheric Administration (NOAA) to James N. Baldwin, Executive Deputy of State, New York Department of State, the State's motion to dismiss was denied. Dr. Knauss stated that it is not clear that the appeal was actually based on an amended project, but that even if it was, the state permitting agency can only license or permit the activity described in the appeal and the state would not be prejudiced as long as it had the opportunity to address the merits of the proposed project during the appeal. He cited to Decisions and Findings of the Secretary of Commerce in the Consistency Appeal of the Korea Drilling Company, Ltd. (Korea Drilling Decision), January 19, 1989.[5] The State's brief was received by the Department on July 2, 1991.

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[4] The "amended project" proposal was submitted by the Appellant to the Corps on March 30, 1990. The "amended project" consists of repairing the existing bulkhead and installing a small platform dock. The Appellant claims that the "amended project" would be done pursuant to the Corps' nationwide permit program, 33 C.F.R. § 330.5(a)(3) [sic]. Letter from the Appellant to Susan Auer, Department of Commerce, dated April 3, 1991. The State noted, however, that it has not granted a general concurrence pursuant to 15 C.F.R. § 930.53(c) for any Corps permit which would allow dock construction on the Hudson River. Therefore, the Appellant's dock project would not be "grandfathered" in by the Corps' nationwide permit program. See State's Brief at 5-6.

[5] In Korea Drilling the California Coastal Commission (CCC) argued that since Korea Drilling Company offered in its appeal "commitments" which it did not offer in its consistency certification, then the activity on appeal was not the same activity which was originally reviewed by the CCC. The Secretary found that "as long as the [CCC] has the opportunity to address the merits of all commitments made during the appeal, whether the commitments were originally made to it or not, and I consider its views, its interest will not have been prejudiced." Korea Drilling Decision at 5.

When the Appellant perfected the appeal by filing a brief and supporting information and data pursuant to 15 C.F.R. § 930.125, public notices soliciting comments on issues pertinent to the appeal were published in the Federal Register, 55 Fed. Reg. 50754-55 (1990) (request for comments), and the Troy Times Record (December 24, 26, 27, 1990). No public comments were received. On December 6, 1990, the Department solicited the views of four Federal agencies[6] on the four regulatory criteria that the Appellant's proposed project must meet for it to be found consistent with the objectives and purposes of the Act. These criteria are defined in 15 C.F.R. § 930.121. All the agencies responded.

After the period for public and Federal agency comments expired, the Department provided the parties with a final opportunity to respond to any submittal filed in the appeal. Both the Appellant and the State submitted response briefs. All documents and information received by the Department during the course of the appeal have been included in the administrative record. However, only those comments that are relevant to the statutory and the regulatory grounds for deciding the appeal are considered. See Decision and Findings in the Consistency Appeal of Amoco Production Company (Amoco Decision), July 20, 1990, at 4.

Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the Act provides that Federal licenses or permits for activities affecting land or water uses in the coastal zone may not be granted until either the State concurs in the determination that such activities are consistent with its federally approved coastal zone management plan (its concurrence may be conclusively presumed in certain circumstances) or the Secretary finds, "after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of [the Act] [Ground I] or is otherwise necessary in the interest of national security [Ground II]." The Appellant has pleaded only the first ground, that the activity is consistent with the objectives of the Act. See Appellant's Brief.

The regulation interpreting the statutory ground "consistent with the objectives of" the Act is found at 15 C.F.R. § 930.121 and states:

> The term "consistent with the objectives or purposes of the Act" describes a Federal license or permit activity, or a Federal assistance activity which,

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[6] Those agencies were the Army Corps of Engineers, the Department of the Interior's Fish and Wildlife Service, the Environmental Protection Agency, and the National Marine Fisheries Service.

> although inconsistent with a State's management program, is found by the Secretary to be permissible because it satisfies the following four requirements:
>
> > (a) The activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the Act,
> >
> > (b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest,
> >
> > (c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and
> >
> > (d) There is no reasonable alternative available (e.g., location[,] design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

In order to sustain the Appellant's appeal, I must find that the project satisfies all four elements of 15 C.F.R. § 930.121. Failure to satisfy any one element precludes me from finding that the project is consistent with the objectives of the Act.

Element Four: Lack of a Reasonable Available Alternative

The fourth element of Ground I is usually decided by evaluating the alternative(s) proposed by a state in the consistency objection. See Decision and Findings in the Consistency Appeal of Chevron U.S.A., October 29, 1990, at 58; Decision and Findings in the Consistency Appeal of Long Island Lighting Company, February 26, 1988, at 16. The Department's regulations at 15 C.F.R. § 930.64(b) provide in part that "state agency objections must describe . . . alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program." As discussed in the Korea Drilling Decision, requiring a state to identify alternatives serves two purposes:

> First, it gives the applicant a choice: adopt the alternative (or, if more than one is identified, adopt one of the alternatives) or, if the applicant believes all alternatives not to be reasonable or available, either abandon the proposed activity or appeal to the Secretary and demonstrate the unreasonableness or unavailability of the alternatives. Second, it

> establishes that an alternative is consistent with a State's program because the State body charged by the act with determining consistency makes the identification of the alternative.

Korea Drilling Decision at 23.

The Appellant does not argue that the alternative offered by the State is "unavailable." Based on the information in the record, I find that the proposed alternative is available since the proposed alternative is a smaller version of the Appellant's proposed project. To satisfy the fourth element of Ground I, however, I must determine that the alternative is also "reasonable."

I have stated in an earlier appeal that an alternative to an objected-to activity or project may require major changes in the "location" or "design" of the project, and that whether an alternative will be considered "reasonable" depends upon its feasibility and upon balancing the estimated increased costs of the alternative against its advantages. Decision of the Secretary of Commerce in the Matter of the Appeal by Exxon Company, U.S.A., to a Consistency Objection by the California Coastal Commission, February 18, 1984. Balancing the costs of the alternative against its advantages requires in this case that I consider, first, the alternative's reduced adverse effects on the land and water uses of the coastal zone, and second, the increased costs to the Appellant of carrying out his proposed dock project in a manner that is consistent with the Act.

As stated above, I must first consider whether the alternative would have "measurably less adverse effects on land and water resources of the coastal zone." Decision and Findings in the Consistency Appeal of Southern Pacific Transp. Co., September 24, 1985, at 19. After reviewing the responses from the four Federal agencies (see supra p. 4), it appears that the alternative would have less adverse effects on nearshore wetland habitats than the proposed project. The letter received from the Corps stated that it had no basis to override the State's decision. Letter from Lester Edelman, Chief Counsel, Corps, to Susan K. Auer, NOAA, dated January 17, 1991. The Appellant interprets this to mean that the Corps is taking a "no comment" position. Appellant's Reply Brief. The Appellant also states that the Corps offers no reason why the decision should be affirmed. Id. The State, however, takes the position that the Corps' comment is consistent with section 303 of the Act which encourages the states to exercise their responsibilities by developing a management program for the coastal zone which gives consideration to ecological, cultural and historical values as well as economic development. See State's Reply Brief at 3.

The U.S. Department of the Interior Fish & Wildlife Service (FWS) had no comment. Letter from Richard Smith, Deputy Director, FWS, to Susan K. Auer, NOAA, dated January 16, 1991. The FWS provided no comments since the Corps had not issued a public notice of application for the permit.[7] Id. The FWS stated that they would review the project when the Corps publishes a public notice. Id.

The Environmental Protection Agency (EPA) stated that it "believes that construction of a small dock incorporating no more than eight slips would minimize use of the waterway and decrease any environmental impacts that may occur as a result of the project." Letter from Richard E. Sanderson, Director, Office of Federal Activities, EPA, to Gray Castle, then-Deputy Under Secretary, NOAA, dated January 25, 1991. The Appellant's response to the EPA's comment is that "[t]here is no showing that the impact of either 8 or 18 boats would be in anyway discernable. . . ." Appellant's Reply Brief.

The National Marine Fisheries Service (NMFS) stated that the area of the Appellant's property was under the influence of the tide and the habitat provides a nursery for some of the anadromous species. Memorandum from William W. Fox, Jr., Director, NMFS, to Susan K. Auer, Office of the Assistant General Counsel for Ocean Services, NOAA, dated January 16, 1991 (NMFS Memorandum). Like the FWS, the NMFS stated that since the Corps had not issued a public notice, they were unable to review the project. The Appellant claims that NMFS is also taking a "no comment" position. The Appellant states that "[a]lthough NOAA is observing one impact under it's [sic] area of concern it does not weigh it against the national interest and it's [sic] letter is essentially one of no comment on the issues involved in the present appeal."[8] Appellant's Reply Brief. The Appellant fails to state that the reason the NMFS did not review the project was because a Corps public notice was never issued. If a Corps public notice had been issued, the NMFS claims that it would have concluded that there would be "adverse effects on nearshore wetland habitats." See NMFS Memorandum. After reviewing the submissions to the record by the parties and the Federal agencies commenting on this appeal I find that the

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[7] From the record before me, it appears that since the project was in conflict with the local zoning and planning authorities, the Office of Historical and Preservation Association, and the Local Waterfront Revitalization Program, a public notice was not issued. See Memorandum from William W. Fox, Jr., Director, NMFS, to Susan K. Auer, Office of the Assistant General Counsel for Ocean Services, NOAA, dated January 16, 1991.

[8] The Appellant also mentioned in his Reply Brief that the EPA and the NMFS offered no opinion as to whether the environmental impacts outweigh the potential national interest. Although I do not need to consider whether the environmental impacts outweigh the potential national interest in determining whether the recommended alternative is reasonable, I nevertheless concur with the Secretary's decision in the Consistency Appeal of Ford S. Worthy, Jr., May 9, 1984 (Worthy Decision) that "[t]he addition of a single marina would contribute minimally to this national interest." Worthy Decision at 10. See also State's Reply Brief.

State's recommended alternative will have less of an environmental impact on the land and water resources of the coastal zone than the Appellant's proposed project.

As stated above, I must also consider whether the alternative would be more costly to the Appellant. The Appellant does not allege or offer any evidence that the alternative design identified by the State as consistent with the NYCMP would cost any more than the one he proposed. In fact, it appears that the alternative proposed by the State would be less costly than the Appellant's proposal since the alternative is a smaller version of the Appellant's proposal. I therefore conclude that the alternative is reasonable as far as cost is concerned.

Another test used to determine reasonableness is whether the proposed project is being denied a consistency certification while similar projects in the area have been found by the State to be consistent. If there are no convincing reasons for the disparate treatment, then the Secretary will probably find the proposed alternative unreasonable. See, e.g., Decisions and Findings in the Consistency Appeal of Gulf Oil Corporation Before the Secretary of Commerce, December 23, 1985, at 22-23; Decision and Findings in the Consistency Appeal of Texaco, Inc. From an Objection by the California Coastal Commission, May 19, 1989, at 38. Another dock project nearby to the Appellant's proposed project was found by the State to be consistent with the NYCMP because the dock was strictly for four private recreational boats and would be non-commercial in use. See Department of the Army Permit No. 15647, Permittee Francis X Farrell, dated March 15, 1990, submitted as Exhibit J to the State's Brief. The Appellant acknowledges that the Farrell property is a non-riparian parcel since it is across the street from the shoreline. The Appellant states that the project was nevertheless approved by the Federal, state, and local governments. Appellant's Submission in Support of the Notice of Appeal November 19, 1990. The Appellant requests that his non-riparian property at 40 Broadway also be included in calculating the number of dock slips for his proposed project. Id.

The State does not refute the Appellant's claim that the Farrell property is a non-riparian parcel. State's Brief at 18-19. Yet, the State questions the "validity of including a non-riparian parcel of land, 40 Broadway, in a calculation intended to determine the nature and extent of riparian rights for Appellant's waterfront property (37 Broadway and the adjoining 82 foot wide parcel)." Id. Moreover, consistent with the State's approval of the dock project for the Farrell property because it would be for non-commercial use, the State objected to the Appellant's project because of its possible commercial use.

The Rensselaer City Planning Commission (Commission) met on April 3, 1990, and found the Appellant's proposed project inconsistent with the Historic Residential (HR) zoning district in which the property is located. Letter from Douglas Burgey, Director, and James Van Vorst, Chairman, City of Rensselaer Planning and Development Agency to the Appellant, dated April 5, 1990, submitted as Exhibit D to the State's Brief (State's Exhibit D). The Commission found that the Appellant's proposal was also inconsistent with the LWRP since "the City Zoning Law is an important tool through which the City's approved Local Waterfront Revitalization Program (LWRP) is implemented. . . ." Id. The Commission noted that the Appellant's proposed dock was too large for personal use and was not accessory to the principal use of the property which is multi-family residential. Id. The Commission acknowledged that the dock would be open to the public and that there would be a charge for the use of the dock which suggested a commercial venture. Id. A commercial venture is not allowed in an HR zoning district. Id. The Commission was also concerned about the adverse effects such as "traffic, noise, litter and pollution. . ." from the Appellant's proposed project. Id. The Commission suggested that the Appellant's project have no more than four slips and that it be restricted to "personal use and use by the tenants of the multi-family dwelling presently on the property." Id. The Commission's motion passed unanimously. Id. Local residents turned out in force to oppose the project. Troy Times Record Article, April 4, 1990, submitted as Exhibit H to the State's Brief. Also, according to the Troy Times Record article, William Spath, a Commission member, said that the Board had "set a precedent" after denying a similar proposal for a 12 boat facility the previous year. They approved the project only after it had been scaled back to four boats. Id. Mr. Spath stated that a stipulation was made that the dock would only be used for private use and that no money would change hands. Id.

As evidenced above, the Commission and the local residents have a strong interest in preserving the HR district. The Commission suggested to the Appellant an alternative of four slips. The State in its recommended alternative has allowed the Appellant eight slips for his recreational use and the recreational use of his tenants. See State's Consistency Objection Letter, dated September 28, 1990.

The Appellant contends that the alternative is unreasonable because it prohibits the use of the dock on a rental basis and because it limits the dock size to only eight slips. The Appellant espouses numerous formulas for calculating the number of dock slips he believes should be allowed. See, e.g., Appellant's Submission in Support of the Notice of Appeal by Letter dated November 19, 1990; Appellant's Brief; Appellant's Reply Brief. However, despite the Appellant's formulas he has failed to show that the State's alternative is unreasonable.

From the analysis above, I find that the Appellant's claims that the alternative is unreasonable are without merit.

In view of the above it appears that the State's alternative would permit the proposed project to be conducted in a manner consistent with the NYCMP. The Appellant has failed to demonstrate the unreasonableness or unavailability of the alternative, therefore, in accordance with the foregoing analysis, I find that there is a reasonable alternative available that would permit the Appellant's proposed project to be conducted in a manner consistent with the NYCMP. See 15 C.F.R. § 930.121(d).

Conclusion

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain his appeal, failure to satisfy any one element precludes my finding that the Appellant's project is "consistent with the objectives or purposes of the [Act]." Having found that the Appellant has failed to satisfy the fourth element of Ground I, it is unnecessary to examine the other three elements. Therefore, I will not override the State's objection to the Appellant's consistency certification.

Barbara H. Franklin
Secretary of Commerce